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Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 472.

VESSEL JUDITH LEE ROSE, INC.,
Petitioner,

v.

DOROTHY M. CHERMESINO, ADMINISTRATRIX,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

MELVIN I. BERNSTEIN,
Proctor for Respondent.

MILES J. SCHLICHTE,
Of Counsel.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Ground of Jurisdiction Claimed by Petitioner.

The petition sets forth that the jurisdiction of this Court rests on 46 U.S.C. § 761. That statute is the Death on the High Seas Act, appearing in the petition at the bottom page 2. It in no way refers to jurisdiction of this Court.

The considerations governing review on certiorari are stated in the Revised Rules of the Supreme Court of the United States, Rule 19. Not one of the reasons appearing in that rule is either stated or developed by the petitioner in its argument. The only reason stated is an appeal to this Court to revoke the doctrine of unseaworthiness and thus "erase more than just a page of history."

Questions Presented by Petitioner and Summary of Respondent's Points.

The petition presents, on page 2, three questions. The same ground is covered by #1 and #3, and these two questions are not argued in the petition.

The questions presented by the petition and the respondent's answers thereto may be summarized as follows:

(1) *Under the Death on the High Seas Act, is the unseaworthiness of a vessel resulting in the death of a seaman on the high seas a "wrongful act, neglect or default"?* As stated above, this question is not argued in the petition; but it has been decided by this Court and will be considered in this brief.

(2) *Was the vessel here involved unseaworthy?* The argument presented by the petitioner does not state that the facts in this case (a latent defect in an iron shackle pin that broke and released the shackle and gear, killing a crew member) do not come within a category of unseaworthiness covered by decided cases, but rather asks this Court to throw out the whole doctrine of unseaworthiness. We shall direct our attention in the main to the decided cases, and consider only briefly the petitioner's argument against the doctrine in its entirety.

Counter-Statement of the Case.

In the main the petitioner's statement of the case is accurate. The facts are stated clearly in the opinion of Sweeney, Ch. J. (R. 7). As to the responsibility with respect to the care and inspection of the rigging, Sweeney, Ch. J., found as follows: "According to the custom in the fishing industry the care and inspection of the rigging was a responsibility of the owners, and there was testimony

that on the "Judith Lee Rose" this responsibility was generally discharged by the deceased. But the parties agree that the defect could not, in any event, have been detected. Moreover, there was also evidence, and I find, that the last inspection before the accident was not performed by the deceased. It cannot, therefore, be said that the decedent's own acts were responsible for the accident" (R. 9).

Argument.

UNDER THE DEATH ON THE HIGH SEAS ACT, IS THE UNSEAWORTHINESS OF A VESSEL RESULTING IN THE DEATH OF A SEAMAN ON THE HIGH SEAS A "WRONGFUL ACT, NEGLECT OR DEFAULT"?

As stated above, the petitioner has in no way argued this point. To the extent that this point is covered at all, it presents the case for the respondent. The following appears on pages 4 and 5 of the petition: "It seems to follow logically that if a seaman can recover for a personal injury to himself arising out of the unseaworthiness of a vessel, then there should be recovery for the ultimate of personal injury—the death of a seaman, arising out of the same type of cause. If the seaman had lived, then under *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85 (1946), the seaman would have recovered even though the injury was caused by a latent defect; and logically, it would seem that if the seaman is killed by the same cause, recovery should be had by the personal representative of the deceased; and again, logically, it would seem that since the common law did not take care of the death caused in the manner above described, then certainly the statute should take care of it. However, the petitioner contends that since the Death on the High Seas Act is a statute, then a reasonably literal approach should be taken by the court."

In the quotation above, the petitioner asks this Court for a "reasonably literal approach." If negligence alone is to be the basis of liability, what meaning have the words "wrongful act . . . or default" in the Death on the High Seas Act?

This Court has passed on this matter in the recent *Skovgaard* case, which will be considered in some detail below:

> *Skovgaard* v. *The M/V Tungus*, 252 F. 2d 14 (3d Cir. 1957); *The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959).

That was an action brought for the death of Skovgaard while the vessel was tied up at the pier in Bayonne, New Jersey. Staley, J., at page 16, discusses the Death on the High Seas Act—"an effort to obviate a plain inequity"—and then goes on to say that the New Jersey Wrongful Death Act must apply, since the death occurred in territorial waters. In the New Jersey statute we find the same words: "wrongful act, neglect or default." The following is a quotation from the Court of Appeals opinion, at page 17:

> "'It is urged that since unseaworthiness is spoken of as a species of liability without fault, it cannot be a 'wrongful act, neglect or default' within the meaning of the statute. However, the characterization of unseaworthiness as liability without fault is dangerously deceptive. For urgent and sound reasons of public policy, the law has imposed the absolute duty upon the shipowner to provide a seaworthy vessel, and liability results only as a consequence of the breach of that duty. If 'fault' means negligence alone, of course no fault is required, and to that extent only, the phrase 'liability without fault' is accurate. But

to say that one who breaches a duty is without fault is a logical as well as a legal incongruity.

"The seaman possesses the legal right of a seaworthy vessel. Whenever this legal right is infringed and harm results by reason of the ship being unseaworthy, a 'wrong' occurs, whether it be of omission or commission."

In the Supreme Court the Circuit Court decision was affirmed. In a separate opinion, concurring in part and dissenting in part, by Brennan, J., at page 601, we find the following: "It would be a strained statement of the effect of *The Harrisburg* to say that there was no duty imposed by the maritime law not to kill persons through breach of the duty of seaworthiness." As Brennan, J., points out, the reach of the Death on the High Seas Act is the furnishing of a remedy, rather than the imposition of a new kind of duty.

In Supreme Court decisions since *Skovgaard* the doctrine has been extended. The Court held in *Hess* v. *United States*, 361 U.S. 314 (1960), that an action "created by the Oregon Employers' Liability Law may be invoked to recover for a maritime death in that State. . . ." (p. 321). In Mr. Justice Harlan's dissenting opinion at page 333 the following appears: "Thus, where the duty imposed by a state death act *is no greater than that already existing under federal law*, the application of the statute is solely, or nearly so, a reaction to strong, localized state interests, and there is no real encroachment on federal interests." (Emphasis supplied.) And in *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961), at 739, the Court recognizes that Skovgaard "attempted an accommodation between a liability dependent primarily upon the breach of a maritime duty and state rules governing the extent of recovery for such breach."

The following lower Court decisions are in accord: *McLaughlin* v. *Bildberg Rothchild Co., Inc.*, 167 F. Supp. 714 (S.D. N.Y. 1958); *State of Maryland* v. *Weyerhaeuser S.S. Co.*, 176 F. Supp. 664 (D. Md. 1959); *Middleton* v. *United Aircraft Corp.*, 204 F. Supp. 856 (S.D. N.Y. 1960).

Was the Vessel Here Involved Unseaworthy?

The Supreme Court, in a series of decisions, has established the doctrine that the defective pin in the instant case would make the vessel unseaworthy. *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96 (1944). *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85 (1946). *Alaska Steamship Co., Inc.*, v. *Petterson*, 347 U.S. 396 (1954). *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960). The *Sieracki* and *Petterson* cases resemble the present case on the element of unseaworthiness, and are considered below.

The *Sieracki* case is one in which the injury resulted from a defective shackle and the defect was such that it could *not* have been found by visual inspection. Quoting from the Circuit Court decision at page 101: "We think it is undisputed that if the falling boom had hit one of the sailors the injured seaman could have recovered from the ship's owner, or the ship, on the basis of breach of warranty of seaworthiness; that warranty not being dependent upon a showing of negligence at all." *Sieracki* v. *Seas Shipping Co.*, 149 F. 2d 98 (3d Cir. 1945). And in the Supreme Court it was stated that the finding that the ship was unseaworthy is not disputed. *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85. It is interesting to note that both the *Sieracki* case and the present case involved defective shackles in which the defect was latent. See Opinion of Sweeney, C.J. (R. 8).

In the *Petterson* case the injury resulted from a broken block. There was no evidence as to the condition of the

block prior to the accident. While the block was being used in a proper manner it broke. "If the block was being put to a proper use in a proper manner, as found by the district judge, it is a logical inference that it would not have broken unless it was defective—that is unless it was unseaworthy." The Court went on to say that it was not a case of applying the "res ipsa loquitur" doctrine of inferring negligence. No negligence was required. "It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists." *Patterson* v. *Atlantic Steamship Co., Inc.*, 206 F. 2d 478 (9th Cir. 1953), at page 479. On appeal the Supreme Court affirmed the Court of Appeals in a decision remarkable only for its brevity—four words: "The judgment is affirmed." *Alaska Steamship Co., Inc.*, v. *Patterson*, 347 U.S. 396 (1954).

And with the *Mitchell* case, cited above, the divorce between unseaworthiness and even the slightest degree of negligence has become final. The recent case of *Morales* v. *City of Galveston*, 370 U.S. 165 (1962), while giving approval to the unseaworthiness doctrine as applied to defective gear (our *Chermesino* case) or appurtenances in disrepair, refuses to extend the doctrine to the introduction of noxious agents from without. The dissenting opinion considers the *Morales* case an even clearer case than *Mitchell*. See "The Doctrine of Unseaworthiness in the Lower Federal Courts," 76 H.L.R. 819 (Feb. 1963). In no case has the conclusion in the *Sieracki* case been questioned—and, as Sweeney, C.J., points out in a footnote on page 8 of the record, "The cause of the accident in this case is indistinguishable from that in *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85 (1946), where the vessel was found to be unseaworthy."

In light of this well-established humanitarian doctrine, it is not surprising that in its brief before the Court of

Appeals, the petitioner stated on page 6: "The appellant concedes that the vessel was unseaworthy by reason of the defective pin." Nor is it surprising that the Court of Appeals affirmed the judgment of the District Court in a per curiam opinion. (P. 7.)

The petitioner argues that the economic impact of the unseaworthiness doctrine will put the vessel owners out of business. Similar arguments have been presented in the child-labor cases, the minimum wage cases and against the abolition of slavery. Somehow this country has survived and has become a better place to live in. The doctrine of unseaworthiness has, of course, increased insurance premiums that vessel owners have to pay. And for that increased premium the widows and orphans of seamen killed at sea as a result of an unseaworthy vessel at least are kept off the rolls of public charity.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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